STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 25, 2005
v	No. 249269 Newaygo Circuit Court
ROGER LEE WADE, Defendant-Appellant.	LC No. 02-007697-FH

Before: Smolenski, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

A jury convicted defendant of two counts of assault with intent to commit great bodily harm less than murder.[1] The trial court sentenced defendant to concurrent terms of eight to fifteen years in prison for each conviction. Defendant appeals his convictions and sentences, and we affirm.

I

This case arises from the assaults of Janet Robeck and Ronda Burke. Robeck and Burke generally would go for a brief walk after work. On the night of June 6, 2002, as Robeck and Burke began their walk, they noticed a man wearing dark colored clothing with a white stripe, walking on the other side of Main Street. When Robeck and Burke reached the high school, they crossed Main Street to complete their walk on the south side. While they were walking, Robeck noticed the man she previously saw. He was further ahead of them and crossed from the north side of Main Street to the south side. Near Weaver Street, the same man lunged out at Robeck and Burke from a crouched position behind a cement wall. He grabbed at them with outstretched arms. Robeck ducked out of the man's grasp. When she did, the man knocked Burke into the street. Burke was unable to cushion her fall and her head bounced off the pavement. She thought the man was going to kill her. She put her hands over her face and drew her knees up to protect her body. She also began screaming. Robeck heard Burke screaming and turned to see that Burke was in the roadway with the attacker crouched over her. Robeck grabbed the man's jacket and tried to push him away from Burke. At that point, the man grabbed Robeck's hair.

[1] MCL 750.84.

He began punching her: she was face to face with the attacker and looked into his eyes. Both Robeck and Burke noticed that the man was well built and stocky. He had a black stocking hat on his head. Robeck believed that the man hit her more than two times. She recalled that the first punch hit her in the back of the head. The last punch hit her in the left eye and knocked her down. Robeck felt useless in her struggle against the man and thought he was going to kill her. He was punching her very hard, and the attack seemed to last "forever." Robeck observed her attacker's profile in both directions during the incident. After knocking Robeck to the ground, the attacker turned back to Burke, who believed he planned to hit her again. Before he could do so, a car approached on Main Street and the man ran away. Burke and Robeck flagged down the approaching car and received a ride to the police station. The driver of the passing car testified that she saw a person with dark clothing and a white stripe running away as Burke and Robeck approached her car. The car's passenger also testified that he saw a man with a skullcap and black clothes, who was muscular and not tall, sprint away from the area. The passenger noticed that the man's clothes reflected, consistent with having a white stripe on them.

Burke and Robeck provided a brief description of their assailant to Sergeant Randall Wright, who immediately thought of defendant. Defendant fit the description, and Wright had observed him sitting in front of the Coffee Cup restaurant on Main Street shortly before the attacks. Wright notified a patrol officer that he thought defendant lived in the Oak Creek Apartments. Defendant was apprehended at the corner of Main Street and Connie, near the entrance to the Oak Creek Apartments. He was wearing a black, nylon head cap, a black sweat suit with a white stripe, and tennis shoes. Defendant was sweaty and appeared tired. He denied being "downtown" and denied perpetrating the assaults.

II

Defendant contends that his convictions must be reversed because the complaint and warrant issued after his warrantless arrest were defective and because he did not receive a probable cause hearing within forty-eight hours of his warrantless arrest. Defendant moved for a new trial, in part, arguing that he was not properly arraigned within forty-eight hours and never received a probable cause hearing until his July 11, 2002, preliminary examination. The trial court denied the motion. We review the trial court's decision for an abuse of discretion. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000). Because these arguments are raised for the first time on appeal, they are not preserved, and will be reviewed under the plain error rule. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).[2]

[2] Defendant cites *Todd v Dep't of Corrections*, 232 Mich App 623; 591 NW2d 375 (1998), for the proposition that the issue "[w]hether the Complaint in this case was defective states a jurisdictional issue which can be raised at any time." His reliance on *Todd* is misplaced. *Todd* is a civil case wherein the plaintiff filed a third-party complaint and the defendant argued that the circuit court lacked subject matter jurisdiction. The Court ruled that lack of subject matter jurisdiction can be raised at any time. *Id.* Defendant in this case raises no issues with respect to subject matter jurisdiction, but rather argues that there were technical failures with respect to his arrest and arraignment that require reversal.

Defendant's argument disregards the procedural history of his case. Defendant was arrested without a warrant on June 6, 2002. The record reveals that a complaint and warrant were filed with the court on that day, that defendant was arraigned the day defendant was arrested, June 6, 2002, and assigned counsel on June 6, 2002. Further, defendant's bail was decided.

The complaint filed on June 6, 2002, was not defective. MCR 6.104(D) provides:

> If an accused is arrested without a warrant, a complaint complying with MCR 6.101 must be filed at or before the time of arraignment. On receiving the complaint and on finding probable cause, the court must either issue a warrant or endorse the complaint as provided in MCL 764.1c; MSA 28.860(3). Arraignment of the accused may then proceed in accordance with subrule (E).

There can be no dispute that the complaint filed on June 6, 2002 complied with MCR 6.101, which provides:

> (A) A complaint is a written accusation that a named or described person has committed a specified criminal offense. The complaint must include the substance of the accusation against the accused and the name and statutory citation of the offense.
>
> (B) The complaint must be signed and sworn to before a judicial officer or court clerk.
>
> (C) A complaint may not be filed without a prosecutor's written approval endorsed on the complaint or attached to it, or unless security for costs is filed with the court.

Contrary to defendant's argument, the complaint did not have to contain factual allegations to support a finding of probable cause. MCL 6.101; see also MCL 764.1a(1), which requires only that the complaint allege the commission of an offense and be sworn before a magistrate or clerk. Moreover, while a finding of probable cause may be based on factual allegations in a complaint, it may also be based on the complainant's sworn testimony or an affidavit. MCL 764.1a(2). In this case, the district court indicated, on June 6, 2002, that "[u]pon examination of the complaining witness, I find that the offense charged was committed and that there was probable cause to believe that defendant committed the offense." A jurisdiction that provides a judicial determination of probable cause within forty-eight hours of arrest will, as a general matter, be found to comply with the promptness requirement of the Fourth Amendment. *People v Whitehead*, 238 Mich App 1, 2-3; 604 NW2d 737 (1999), citing *Riverside Co v McLaughlin*, 500 US 44, 56; 111 S Ct 1661; 114 L Ed 2d 49 (1991). The record supports that a finding of probable cause was made within the forty-eight-hour time frame and an appropriate criminal complaint was filed.

Additionally, we reject that reversal is warranted because the district court failed to sign the warrant. MCR 6.104(D) requires the court to comply with MCL 764.1c, which provides:

> (1) If the accused is in custody upon an arrest without a warrant, a magistrate, upon finding reasonable cause as provided in section 1a of this chapter, shall do either of the following:
>
> (a) Issue a warrant as provided in section 1b of this chapter.
>
> (b) Endorse upon the complaint a finding of reasonable cause and a direction to take the accused before a magistrate of the judicial district in which the offense is charged to have been committed.
>
> (2) As endorsed pursuant to subsection (1)(b), the complaint shall constitute both a complaint and warrant.

Here, the warrant contained an endorsement that a finding of reasonable cause was made. It also contained an instruction that defendant must be taken before the 78th District Court immediately. The complaint, attached to the warrant, is signed. It is clear that the district court treated the warrant and complaint as one document. MCL 764.1c(2). Even if the district court should have written the endorsement on the complaint, we find no plain error requiring reversal where the documents were treated together and all of the procedural requirements were met. *Carines*, *supra.*

III

Defendant raises several issues with respect to a photographic lineup and the victims' subsequent in-court identifications of defendant. Defendant argues that he was denied his constitutional right to counsel at the photographic array, that the array was unduly suggestive, that the trial court erred in refusing to hold a *Wade*[3] hearing, and that the trial court should not have found an independent basis for the in-court identifications based on the prosecutor's offer of proof without any hearing.

A trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). "Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made." *Id.* We review de novo whether defendant was denied his constitutional right to counsel. See *In re Wentworth*, 251 Mich App 560, 561; 651 NW2d 773 (2002) (constitutional issues are reviewed de novo).

Defendant was not represented by counsel during the photographic lineups held after the victims were treated at the hospital and given pain medication on June 6, 2002. Before the lineups, the victims were told that a suspect was in custody. Robeck picked out two photographs as the possible attacker, one of which was defendant. She was not one hundred percent positive of her identification, but was relatively sure that defendant's picture depicted the attacker. Burke picked out a photograph of someone other than defendant, but she was unsure of her identification. She had a headache and could not think clearly. When Robeck later saw

[3] *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

defendant in court at the preliminary examination, she became upset and nervous. She was positive that he was the attacker. Burke also became scared and sick when she saw defendant in person at a pretrial proceeding. She was sure defendant was the attacker because of his physical build and height.

On the first day of trial, defendant argued that his right to counsel was violated at the photographic lineup and that the procedure used was unduly suggestive. He requested a hearing and moved for suppression of the victims' in-court identifications. However, he wanted to admit into evidence the victims' misidentifications from the photographic lineups. The trial court ruled that defendant's motion was untimely, and the court found a sufficient independent basis for the victims' in-court identifications based on the prosecutor's offer of proof.

Because "the right to counsel [at pretrial identifications] attaches only to corporeal identifications at or after the initiation of adversarial judicial criminal proceedings,"[4] *People v Hickman*, 470 Mich 602, 611; 684 NW2d 267 (2004), we reject defendant's claim that he was denied his constitutional right to counsel.[5]

We also reject defendant's claim that the photographic lineups were unduly suggestive and may have precipitated the victims' later in-court identifications. In *Moore, supra* at 226-227, the Court noted that identifications conducted before the initiation of adversarial judicial proceedings may be challenged in certain circumstances. Due process protects an accused against the introduction of unreliable pretrial identifications obtained through unnecessarily suggestive procedures. *Id.* See also *Hickman, supra* at 607.

> In order to sustain a due process challenge, a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification. [*Kurylczyk, supra* at 302-303, citing *Neil v Biggers*, 409 US 188; 93 S Ct 375; 34 L Ed 2d 401 (1972).]

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[4] Adversarial judicial proceedings commence by way of formal charge, preliminary hearing, indictment, information, or arraignment. *Hickman, supra* at 611.

[5] We note that photographic lineups are generally not permitted when the defendant is in custody and available for a corporeal lineup. *People v Anderson*, 389 Mich 155, 186-187; 205 NW2d 461 (1973) overruled on other grounds, *Hickman, supra* at 611; *Kurylczyk, supra* at 298 n 8; 505 NW2d 528 (1993). There are exceptions to this general rule. *Anderson, supra* at 186-187 n 22. On appeal, defendant argues that a photographic lineup should not be used when a suspect is in custody or can be compelled to appear for a corporeal lineup. Any issue with respect to the use of a photographic lineup instead of a corporeal lineup is abandoned by the cursory treatment given to it by defendant. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) (an appellant may not merely announce a position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority). Furthermore, review of this issue is inappropriate, because it is not raised in the statement of questions presented. *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999).

Photographic identifications may be unduly suggestive if the police inform the victim that they have apprehended the correct person, if a witness is shown only a photograph of the defendant, or if the defendant's photograph is singled out in some manner from other photographs in a group. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998).

Here, defendant does not identify how the photographic lineup was unduly suggestive, other than that he was not represented by counsel. The record at trial did not demonstrate that the victims were told that the correct person was apprehended, that the victims were shown defendant's photograph by itself, that defendant's photograph stood out from the other photographs in the array, or that the victims were informed about which picture depicted the man in custody. The record does not indicate that they were given any relevant information about the man in custody that would enable them to identify him through his photograph. Accordingly, defendant has not sustained a due process challenge to the photographic identification.

Indeed, defendant does not actually dispute that he has failed to support his claim that the photographic lineups were unduly suggestive. Rather, he argues that he was "left totally unable to establish whether the pretrial identification procedures were suggestive" because the trial court did not hold an evidentiary hearing. We disagree. Before the evidentiary portion of defendant's trial began, the trial court gave defendant a full opportunity to argue his motion. During his argument, defendant failed to make an offer of proof or provide any argument to support his position that an evidentiary hearing would produce evidence that the lineups were suggestive.[6]

We note that defendant does not challenge the substance of the trial court's finding that, based on the prosecutor's offer of proof, there was an independent basis for the victims' in-court identifications.[7] Rather, he argues that the trial court should not have made the determination

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[6] Further, defendant's request for the hearing was untimely. *People v Childers*, 20 Mich App 639, 646; 174 NW2d 565 (1969) ("[w]here the factual circumstances constituting the illegal confrontation are known to the defendant in advance of trial, the defendant is responsible for communicating them to his lawyer and his lawyer, in turn, is responsible for making a motion to suppress *in advance of trial.*") Here, defendant was aware of the factual circumstances of the photographic lineup well in advance of trial. His counsel admitted that he knew about the issue in advance of trial. He provided no adequate excuse for failing to move for the hearing before the first morning of trial. Thus, the request was untimely. Additionally, defendant did not disclose any specific circumstances to support his belief that the lineup was unduly suggestive. And, the crime, photographic lineups, and in-court identifications occurred within several weeks of each other. Given that defendant's request for a hearing was untimely, that defendant did not articulate why the identification may have been suggestive, and that there was no excessive delay between the crimes and the challenged identifications, we find insufficient grounds to require an evidentiary hearing on the motion. We affirm the trial court's decision to refuse to hold a hearing.

[7] In *Anderson*, *supra* at 169, the Court held that, where there was no counsel at the pretrial identification or where the procedures used were unnecessarily suggestive, an in-court identification may still be admitted if there is an independent basis for the prior identification. See *Gray*, *supra* at 115. In this case, the trial court ruled that, consistent with the prosecutor's offer of proof made off the record, there was a sufficient independent basis for the identifications during trial. The trial court apparently believed that an independent basis had to be established

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based on the prosecutor's offer of proof without a hearing. Defendant cites no authority for this position. Moreover, "[t]he need to establish an independent basis for an in-court identification only arises where the pretrial identification is tainted by improper procedure or unduly suggestive comments." *People v Laidlaw*, 169 Mich App 84, 92; 425 NW2d 738 (1988). Defendant has not shown that the photographic identification was tainted by improper procedure or was unduly suggestive. Thus, there was no need to establish an independent basis for the in-court identifications. *Id.* at 93 (where defendant did not articulate any reason to find that the lineup procedure was improper and where nothing in the record suggested that the procedures were unduly suggestive, there was no need to establish an independent basis for the identifications). Even if an independent basis was necessary, because defendant fails to challenge the substance of the trial court's ruling that an independent basis existed, review of that ruling is inappropriate. *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999).

IV

Defendant also argues that his first trial attorney was ineffective for failing to move for a *Wade* hearing or suppression of the victims' identification. Our review of this issue is limited to errors apparent on the record because no *Ginther*[8] hearing was held. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). In order to prevail on a claim that counsel was ineffective, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). He must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *Stanaway*, *supra*; *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

The decision to move to suppress an identification or move for a *Wade* hearing is a matter of trial strategy. *People v Carr*, 141 Mich App 442, 452; 367 NW2d 407 (1985). The record does not indicate that the failure of defendant's first attorney to move for suppression or a hearing was error as opposed to sound trial strategy. At the preliminary examination, defendant's first attorney used the photographic lineup evidence to discredit Robeck. The misidentification and uncertainty at the lineup was exculpatory evidence. We note that defendant's trial counsel followed a similar tactic with both victims at trial, trying to discredit them based on their conduct at the photographic lineups and the manner in which they ultimately identified defendant. Because defendant has not overcome the strong presumption that counsel's decision was sound trial strategy, defendant's claim of ineffective assistance of counsel fails. *Stanaway, supra.*

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because defendant was not represented by counsel at the photographic lineup.

[8] *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973). While defendant requested a *Ginther* hearing, the trial court denied the request. Defendant does not appeal the trial court's ruling in this regard.

V

Defendant challenges the admission of tracking-dog evidence, which was presented at trial. This issue is not preserved because, while defendant raised the issue in his new trial motion, he failed to object at trial before the evidence was admitted. A contemporaneous objection provides the trial court with "an opportunity to correct the error, which could thereby obviate the need for further legal proceedings and would be the best time to address a defendant's constitutional and nonconstitutional rights." *Carines*, *supra* at 764-765. We review unpreserved issues, constitutional and nonconstitutional, to determine if the defendant has demonstrated the existence of a plain error, which affected his substantial rights, i.e. affected the outcome of the lower court proceedings. *Id.* at 763-764.

In order to establish the required foundation for admitting tracking-dog evidence, a prosecutor must show that the handler was qualified to use the dog, the dog was trained and accurate in tracking humans, the dog was placed on the trail where the alleged guilty party was said to have been, and the trail had not become so stale or contaminated that it was beyond the dog's competency to follow it. *Laidlaw*, *supra* at 93, citing *People v Harper*, 43 Mich App 500, 508; 204 NW2d 263 (1972). Here, Robert Mendham testified that he was the canine officer for the Newaygo County Sheriff's Department. He and his tracking dog, Razz, had been together for approximately four years and were both trained for tracking. Mendham attended five weeks of schooling with a certified trainer. He was certified in April 1999, and he and Razz continued to undergo yearly certification testing through the United States Canine Police Association. They always passed the tests, which required Razz to track an individual on a planted trail. Mendham's testimony supports the first two foundational requirements. Further, Mendham testified that Razz was placed at the intersection of Weaver Street and Main Street. Razz tracked down Weaver Street. This testimony established the third foundational requirement, and it also demonstrated Razz's accuracy because the victims testified that their attacker ran down Weaver after the attacks. This information was not known to Razz or Mendham when they began tracking. Finally, Razz and Mendham were at the scene to track the suspect at 1:40 a.m., and Razz was trained to track scents up to 2 or 2-1/2 hours old, which was within the applicable time frame. Because the testimony was sufficient to establish the requisite foundation for the admission of the tracking evidence, there was no plain error.[9] *Carines*, *supra.*

VI

Defendant challenges his sentence of eight to fifteen years in prison, which represented a departure from the recommended minimum sentence range of ten to twenty-eight months under the legislative guidelines. A departure from the sentencing guidelines is only allowed if there is a substantial and compelling reason for the departure. *People v Babcock*, 469 Mich 247, 255, 272; 666 NW2d 231 (2003). A "substantial and compelling" reason is an objective and

[9] Further, defendant says that the trial court's failure to give a limiting instruction with respect to the tracking dog evidence constitutes error requiring reversal. However, because defendant expressed satisfaction with the jury instructions after the were read to the jury, defendant has waived any instructional error here. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004).

verifiable reason that keenly or irresistibly grabs our attention, is "of considerable worth" in deciding the length of the sentence, and exists only in exceptional cases. *Id.* at 257, 272.

> [T]he existence or nonexistence of a particular factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error. The determination that a particular factor is objective and verifiable should be reviewed by the appellate court as a matter of law. A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for an abuse of discretion. [*Id.* at 264-265, 273-274 (quotation omitted).]

Where a trial court articulates multiple "substantial and compelling" reasons for departure, this Court must determine whether the alternate reasons are substantial and compelling, and if some are not, it must determine whether the trial court would have departed and would have departed to the same degree on the basis of the substantial and compelling reasons alone. *Babcock*, *supra* at 260, 273. An abuse of discretion occurs when the trial court chooses an outcome falling outside of the principled range of outcomes. *Id.* at 269, 274.

In departing from the sentencing guidelines, the trial court stated that defendant was not amenable to rehabilitation and that defendant was a danger to the public.[10] The trial court articulated that defendant was not amenable to rehabilitation because he was previously sentenced to a lengthy prison term and served his maximum sentence. During that incarceration, defendant received ninety misconducts, including sexual misconduct, insolence, and threatening behavior. Shortly after his release, he committed two assaults, and the instant crimes were committed within fifteen months. We conclude that objective and verifiable evidence supported the trial court's determinations that defendant was not amenable to rehabilitation and was a danger to the public because of his unwillingness or inability to conform his conduct to the law. Each time defendant has been released from custody, he has committed an assaultive crime.[11] The cited reasons for departure are substantial and compelling. See *People v Hicks*, 259 Mich App 518, 536; 675 NW2d 599 (2003) (substantial and compelling reasons found where defendant had prior convictions for robbery, kidnapping and sexual assault, was institutionally difficult to deal with during his incarcerations, was maxed out on parole, and revictimized a woman within a short time of his release). See also *People v Solmonson*, 261 Mich App 657, 671; 683 NW2d 761 (2004) (defendant's past history reflected that his prior sentences did not deter him, and the trial court had a legitimate concern for the protection of society). Even if the

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[10] Defendant filed a supplemental authority with this Court, arguing that the trial court's findings at sentencing were violative of the United States Supreme Court's decision in *Blakely v Washington*, ___ US ___ ;124 S Ct 2531; 159 L Ed 2d 403 (2004). *Blakely*, however, does not apply to Michigan's indeterminate sentencing system. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).

[11] After serving a fifteen-year sentence, defendant committed two assaults within three months. Approximately one month after his release from jail for those assaults, he committed the instant crimes.

trial court's mention of its personal "feeling" was not objective and verifiable, it is apparent that the trial court would have departed to the same degree due to the objective and verifiable factors. *Babcock, supra.*

We also conclude that the sentencing departure was proportionate to the seriousness of the circumstances surrounding the offense and the offender and thus, was not an abuse of discretion. *Babcock, supra* at 264, 272.[12]

Affirmed.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Richard A. Bandstra

[12] Defendant hid in wait for his victims. He did so in the middle of the night. He viciously attacked them without provocation, and the testimony indicated that the attack ended only because a car approached. Defendant has a history of violent, assaultive crimes. He served a previous fifteen-year sentence for criminal sexual conduct. At his plea hearing for that conviction, he admitted that he entered the victim's home after midnight and forced sexual intercourse on her while she struggled. During his incarceration for that conviction, he was unable to conform his behavior to an acceptable standard and received ninety prison misconducts. Upon his release, he committed two assaults within three months. Approximately one month after his release from his sentence for those convictions, he committed the instant offenses. The sentence of eight to fifteen years is within the principled range of outcomes and is justified by the substantial and compelling reasons stated by the trial court.

Further, defendant maintains that the trial court erroneously denied his motion to quash the district court's decision to bind him over for trial. Because we have held that defendant was fairly convicted at trial, defendant may not appeal, nor may we review, the trial court's decision with respect to defendant's motion to quash. *People v Wilson*, 469 Mich 1011; 677 NW2d 29 (2004), citing *People v Hall*, 435 Mich 599, 601-603; 460 NW2d 520 (1990) and *People v Yost*, 468 Mich 122, 124 n 2; 659 NW2d 604 (2003).